BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SEATTLE DISPLACEMENT COALITION,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

CASE No. 15-3-0015

FINAL DECISION AND ORDER

SYNOPSIS

Petitioner Seattle Displacement Coalition (Coalition) challenged the City of Seattle's adoption of Ordinance No. 124888, amending provisions of its subarea plan for the University District. The Coalition asserted the City failed to comply with SEPA requirements contained in RCW 43.21C.420. The Board found that SEPA Section 420 gives cities the choice of using a specific SEPA procedure when adopting "optional elements of their comprehensive plans and optional development regulations that apply within specific subareas" in order to immunize themselves and subsequent developers from further project-level SEPA appeals after an initial nonproject EIS is completed. The City was not required to use the Section 420 procedure and chose not to use it for the University District plan amendments. The Board concluded the City's action did not violate SEPA,[1] and the petition was dismissed.

THE CHALLENGED ACTION AND BACKGROUND

Ordinance No. 124888 amended the Seattle Comprehensive Plan to change University Community Urban Center (UCUC) goals and policies and the Future Land Use

[1] Board member Raymond Paolella concurs with the outcome on different reasoning.

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Map (FLUM). Ex. 218. The amendments were developed in response to Sound Transit's siting of a light rail station between NE 43rd and NE 45th Streets at Broadway, with a 2021 opening date. To plan for the station area, Seattle Department of Planning and Development (DPD) identified a "U District study area," an area bounded by Interstate 5 on the west, 15th Avenue NE on the east, Portage Bay on the south, and Ravenna Boulevard NE on the north. Ex. 155, ¶ 1. With public outreach, DPD developed a U District Urban Design Framework evaluating greater height and density and some changes in the land use mix in the study area.[2]

The UCUC goals and policies were revised to provide a different balance and intensity of uses, particularly in the station area. The FLUM was specifically changed to modify the boundary of the University District Northwest Urban Center Village boundary. The FLUM also redesignated several areas from Multifamily Residential to Commercial/Mixed Use and several parcels from Single-Family Residential to more intense designations. Ex. 218.[3]

The proposal was supported by a nonproject Environmental Impact Statement for U District Urban Design Alternatives. The DEIS was issued on April 24, 2014, Ex. 49, and the FEIS, following public comments, on January 8, 2015.[4] Ex. 53. The City did not follow the SEPA procedures of RCW 43.21C.420 (SEPA Section 420). The Coalition, along with other parties, challenged the adequacy of the FEIS before the City's Hearing Examiner, who upheld the FEIS on June 19, 2015. Ex. 155. The Hearing Examiner declined to address the Coalition's objection that the City had not appended a separate displacement study

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[2] The U District study area comprises a portion of the overall University Community Urban Center. Exs. 53 at 2-1, 2-2; 155, ¶ 7.

[3] The City notes that in addition to the map and text amendments, DPD has indicated that zoning changes would be accompanied by an affordable housing incentive program, incentives for open space and other neighborhood amenities, and by development standards regulating setbacks, tower separation, and street frontage. Ex. 155, ¶ 2; Ex. 53 at 2-1.

[4] Common SEPA acronyms used by the parties and Board in this case include EIS for Environmental Impact Statement, DEIS for Draft Environmental Impact Statement, and FEIS for Final Environmental Impact Statement. A DNS is a Declaration of Non-Significance.

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pursuant to RCW 43.21C.420(4)(f).[5] Apparently no other Section 420 compliance issues were raised.

The Coalition filed a timely petition for review to the Board. The Board held a hearing on the merits on May 4, 2016, in Seattle. Board member Margaret Pageler convened the hearing as the Presiding Officer with Board members Cheryl Pflug and Raymond Paolella on the panel.[6] Ryan Vancil appeared for the Coalition and was accompanied by John Fox. The City of Seattle was represented by James Haney, accompanied by Deputy City Attorney Liza Anderson.

The hearing provided the Board an opportunity to ask questions to clarify important facts in the case and ensure a clearer understanding of the legal arguments of the parties. Importantly, the hearing clarified that none of the parties was aware of any case law or law review authority with regard to the provisions of SEPA Section 420.

JURISDICTION

The Board finds the petition for review was timely filed pursuant to RCW 36.70A.290(2). The Board finds the petitioner has standing to appear before the Board pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

STANDARD AND SCOPE OF REVIEW

The Growth Management Hearings Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant comprehensive plans, development regulations, or amendments thereto.[7] The Board's jurisdiction is statutorily

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[5] Ex. 155, p. 15, Hearing Examiner Conclusion 12: "In its closing statement, SDC asserted that the City was required to prepare the study described in RCW 43.21C.420(4)(f). This argument was not identified as part of the appeal, and cannot be explored at this stage. But in any event, RCW 43.21C.420(4) states that the study "must not be part of that [nonproject environmental impact] statement" and was not required to be a part of the EIS."

[6] Valerie Allard provided court reporting services.

[7] RCW 36.70A.280, RCW 36.70A.302. *Lewis County v. Western Washington Growth Management Hearings Board*: 157 Wn.2d 488, 498, n. 7, 139 P.3d 1096 (2006): "The Board is empowered to determine whether [a jurisdiction's] decisions comply with GMA requirements, to remand noncompliant

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limited to comprehensive plans and development regulations and to RCW 43.21C, SEPA, only "as it relates to plans, development regulations, or amendments, adopted under [GMA] or [SMA]." RCW 36.70A.280(1).[8]

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[9] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the city is not in compliance with the GMA.[10]

The scope of the Board's review is limited to determining whether the city has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review RCW 36.70A.290(1).The Board shall find compliance unless it determines that the city's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. RCW 36.70A.320(3). In order to find the city's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[11]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[12] However, the

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ordinances to [the jurisdiction], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance."

[8] *See Spokane County v. EWGMHB,* 176 Wn. App. 555, 569-570, 309 P.3d 673 (2013) and *Davidson Serles,* 159 Wn. App. 616, 628, 246 P.3d 822 (2011) (both cases holding that the Board may review petitions alleging non-compliance with SEPA in adopting or amending comprehensive plans or development regulations).

[9] RCW 36.70A.320(1) provides: "[C]omprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

[10] RCW 36.70A.320(2) provides: "[T]he burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."

[11] *Lewis County v. WWGMHB (Lewis County)*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006) (citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

[12] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."

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jurisdiction's discretion is not boundless; its actions must be consistent with the goals and requirements of the GMA.[13]

Thus, in the present case, the burden is on the Coalition to overcome the presumption of validity and demonstrate that the City's adoption of Ordinance 124888 is clearly erroneous in light of the goals and requirements of the GMA.

ISSUE AND DISCUSSION

This case involves a single legal issue, set forth in the prehearing order as follows:

1. Does adoption of the Ordinance violate SEPA because the City of Seattle failed to provide the study and process required by RCW 43.21C.420 (4)(f)?

The study required by RCW 43.21C.420(4)(f) is a special review, independent of the EIS, that "analyzes the extent to which the proposed subarea plan may result in the displacement or fragmentation of existing businesses, existing residents, including people living with poverty, families with children, and intergenerational households, or cultural groups within the proposed subarea plan." The threshold question for the Board is whether Seattle's action triggered the requirement for this displacement study in the first place. The Coalition asserts RCW 43.21C.420 (hereafter Section 420) establishes a mandatory procedure applicable to all subarea plans within the scope of its criteria, thus requiring Seattle to provide a displacement study with its U District station area plan amendments. The Coalition misreads the statute.

As set forth below, the Board's analysis determines that Section 420 provides an "up-front SEPA" methodology which a city may elect to adopt for transit-area or city center planning but which is not mandatory for every GMA subarea adoption. Seattle did not choose to use the Section 420 optional element for its U District station area plan amendments and thus the Board concludes the Section 420(4)(f) special displacement study was not required.

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[13] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). *See also*, *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

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To place the question in context, under the GMA cities and counties may adopt subarea plans providing area-wide planning policies and development regulations consistent with the comprehensive plan.[14] Subarea plans and their associated regulations are thus an optional planning tool.[15] Under SEPA, the likely environmental impact of an area-wide plan is reviewed through a nonproject EIS. WAC 197-11-442. Therefore a city or county will generally review a proposed subarea plan or amendments through a nonproject EIS. Then developers of specific projects within the subarea are responsible for project-specific environmental review. WAC 197-11-440. This iterative environmental review may be duplicative. It can be exploited by opponents to raise costs and, even when well-intentioned, creates delay and frustrates the certainty that is an important goal of our state's land use law.

SEPA Section 420 creates an alternative SEPA process for review of "optional elements" focused on transit station areas and city centers. This alternative pathway provides sufficient public outreach and analysis in the nonproject EIS at the planning level to support specific, subsequent, project-level approval for development within the scope of the original review. Based on this "up-front" SEPA analysis by the city, developers are immune from project-level SEPA review and appeals.

Because subarea plans under GMA are by definition "optional," the Coalition invites us to read the SEPA Section 420 reference to "optional elements" as applicable to all subarea plans that meet the transit-centered criteria of Section 420(1)-(3). However, the wording of the statute is more precise than that. It specifies that, "in accordance with this section," cities may adopt "optional elements of their comprehensive plans and optional development regulations that apply within specific subareas…" Section 420(1). Cities east of the Cascades, "in accordance with this section," may adopt "optional elements of their

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[14] RCW 36.70A.080(2): A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan.

[15] The Coalition points out that the City of Seattle's Comprehensive Plan has an Urban Village Element and a Neighborhood Element. Neither of these is among the mandatory comprehensive plan elements listed in RCW 36.70A.070. Each of these optional elements in Seattle's comprehensive plan contains numerous optional subarea plans. Thus it appears to the Board that there are optional elements and subarea plans at various levels of city planning.

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comprehensive plans and optional development regulations that apply within the mixed-use or urban centers." Section 420(2). Thus Section 420 gives cities the option to develop particular subarea plans and regulations in accordance with Section 420 and to which the requirements and exemptions of Section 420 apply. Section 420(4) continues: "A city that *elects* to adopt *such* an optional comprehensive plan element and optional development regulations …" shall comply with an alternative set of EIS procedures. Thus the "optional element" is not every subarea plan but is a subarea plan and associated regulations voluntarily developed under the Section 420 procedures.

The reason to choose the Section 420 pathway is to encourage urban infill by streamlining procedures. Section 420 provides immunity from future SEPA challenges for subsequent development projects within the scope of the special 420 nonproject EIS. As explained in the statute:

- The nonproject EIS must disclose probable significant adverse environmental impacts "of future development" consistent with the subarea plan. Section 420(4)(a).
- Public notice must "indicate that future appeals of proposed developments that are consistent with the plan will be limited." Section 420(4)(d).
- Proposed developments consistent with the plan may not be challenged for SEPA noncompliance in administrative or judicial appeals. Section 420(5).
- The city is authorized to recoup the costs of its SEPA analysis through fees assessed against subsequent development. Section 420(6).

Thus "optional elements" in this statute denotes the city's "option to adopt" the more costly Section 420 environmental review process for a particular subarea in order to incentivize infill by providing project-level SEPA immunity for subsequent development.

The Coalition contends the statute must be read to require that procedural compliance with Section 420(4) is mandatory whenever a city adopts a subarea plan for a station area or city center. Under this construction, where Seattle proposes to adopt a plan for a subarea meeting the Section 420 (1) to (3) criteria, the City "shall" conduct

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environmental review according to the methodology established in Section 420(4), including preparation of a displacement study.

However, as the Board construes the language of Section 420, the environmental review procedures established in Section 420(4) are mandatory only where the city wishes to preclude project-level SEPA appeals as provided in subsection (5) and "opts to adopt" a subarea plan "in accordance with this section." This reading of the statute is compelling as a matter of policy. The Section 420 procedures represent a significant shift from the traditional SEPA framework and impose a high burden on participating cities. In the first instance, no threshold determination is allowed; a nonproject EIS is required without exception. Section 420(4)(a). Unlike the usual SEPA published and posted notice,[16] direct mailed notice is required to all property owners within 150 feet of the subarea boundaries. Section 420(4)(b). Mailed notice must include general illustrations of proposed building envelopes, and mailing must be re-issued if the building envelope increases during the process. Section 420(4)(d). Thus Section 420(6) acknowledges: "It is recognized that a city that prepares a nonproject environmental impact statement under subsection (4) of this section must endure a substantial financial burden."[17]

For Seattle alone, there are two additional requirements: mailed notice to all small businesses and community preservation and development authorities within 150 feet of the subarea boundary, Section 420(4)(c), and a separate study analyzing the risks of "displacement or fragmentation of existing businesses, existing residents, … or cultural groups." Section 420(4)(f). Seattle's failure to produce this displacement study is the crux of the Coalition's complaint.[18]

Further, the reach of the statute is broad, covering not only Sound Transit light rail station areas and other regional hubs, but "areas within one-half mile of a major transit stop" where "major transit stop" is defined as "stops for a bus … providing fixed route service at

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[16] WAC 197-11-510 requires "reasonable methods to inform the public."
[17] The Senate Bill Report, SB 6720, February 12, 2010, p. 4, notes Dave Williams testified for the Association of Washington Cities: "The level of review is very expensive. It is unlikely that cities will be able to use this without additional resources."
[18] The Coalition has raised no challenge based on the other procedural elements of Section 420.

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intervals of at least thirty minutes during peak hours of operation." Section 420(1)(b) and (3)(e). Thus the half-mile radius of the majority of arterial bus stops in Seattle would fall within Section 420 provisions as plan amendments are contemplated. Under the Coalition's interpretation, any Seattle neighborhood plan or plan amendment encompassing a few bus stops would likely require the extra notice, trigger a displacement study, and provide SEPA immunity for subsequent project development.

The Legislative intent section is instructive:

> **Intent-2010 c 153:** "It is the intent of the legislature to encourage high-density, compact, infill development and re-development within existing urban areas in order to further existing goals of chapter 36.70A RCW, the growth management act, to promote the use of public transit and encourage further investment in transit systems, and to contribute to the reduction of greenhouse gas emissions by : (1) Encouraging local governments to adopt plans and regulations that authorize compact, high-density urban development as defined in section 2 of this act; (2) providing for the funding and preparation of environmental impact statements that comprehensively examine the impacts of such development at the time that the plans and regulations are adopted; and (3) encouraging development that is consistent with such plans and regulations by precluding appeals under chapter 43.21C RCW." [2010 c 153 § 1.]

To read the statute as the Coalition urges is to assume the legislature felt requiring cities in all cases to undertake additional costly and burdensome procedural steps would effectively "encourage high-density, compact, infill development and re-development within existing urban areas." The Board disagrees. Providing an optional process which a city could employ to reduce the burden of future SEPA compliance is more consistent with the legislature's stated intent.

The Board does not find the bill reports particularly helpful in clarifying the intent of the legislation.[19] The reports generally refer to "optional element" without clarifying whether the new provisions allow an up-front SEPA process the city *may elect to adopt* to incentivize

[19] The Board may officially notice acts, resolutions, records, journals, and committee reports of the legislature. WAC 242-03-630(2). However, former State Senator Cheryl Pflug, a member of the panel hearing this case, reminds us pointedly that bill reports, including the three in this record, always include the disclaimer: "This analysis is not a part of the legislation nor does it constitute a statement of legislative intent."

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infill in a particular subarea or whether *every* transit-centered subarea plan must conform to the new SEPA methodology.

However, staff summaries of public testimony in support of the legislation emphasize that this is an opportunity for up-front SEPA review that cities may choose, but are not required, to utilize.

- Senate Bill Report, ESHB 2538 (2010), p. 3 (Emphasis added):

  PRO: The goal is simple *to use streamlined environmental permitting processes* as a way to incentivize in-fill and urban development and the public benefits that this brings. This will help to provide livable, walkable cities. *This is entirely an optional tool for local governments to use, if they wish.*

- House Bill Report ESHB 2538 (2010) p. 5 (Emphasis added):

  PRO: The goal of the bill is to try to attract dense development in urban areas. *This is an upfront SEPA analysis that would not require a project specific SEPA analysis.* It provides certainty and time savings for the city and developer. All other permits are still required and appealable. *This is a voluntary tool and locals will have discretion on whether to use it.* Streamlining the SEPA process would be a big step forward toward urban development. *It provides predictability for development by conducting the SEPA process upfront and protecting development from appeals.*

- Senate Bill Report, SB 6720 (2010) p.3 (Emphasis added):

  PRO: This bill makes a modest change to SEPA which helps to develop sustainable compact development in urban centers and transit areas. It expedites development in designated subareas and will promote economic development and create jobs. It provides for more notice than current law and an appeal option for the adequacy of the EIS. *It assists development at the project level so that each developer does not have to go through SEPA. It reduces time while providing certainty and funding for upfront analysis* and ability to charge late-comers a fee to help pay for the EIS. *This is voluntary for cities that choose to adopt these plans.*

Thus the staff summaries indicate the apparent intent of the legislation was to create a voluntary tool for upfront SEPA analysis by the city and resultant project-level SEPA immunity for developers.

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The parties agreed at the Board's hearing that there are no reported cases or other authorities concerning SEPA Section 240. Richard Settle's SEPA Handbook provides no explanation of the section but references a newsletter article, "Using SEPA to Encourage Economic Development and Sustainable Communities," by Jeremy Eckert, *Environmental and Land Use Law Newsletter*, June 2011. [20]

Mr. Eckert's thesis is that urban infill – particularly transit-oriented urban infill – is made more difficult by the tiered requirement for environmental analysis, and the risk and uncertainty of environmental appeals, at both the plan and project level. To reduce this duplication, "SEPA provides cities with three forms of upfront SEPA to minimize or eliminate SEPA-based appeals at the project level." *Id*. at 7. Mr. Eckert describes (1) infill exemptions, provided in RCW 43.21C.229, (2) planned actions, from RCW 43.21C.440, and (3) "transit-infill review," his name for the provisions of RCW 43.21C.420.[21] He states: "The intent of upfront SEPA is to streamline urban development by reducing or eliminating duplicative environmental review and reducing or eliminating potential SEPA-based administrative appeals *at the project level." Id*. at 7, emphasis in original.

The Board is most familiar with the up-front SEPA methodology of planned action ordinances. Planned action review, RCW 43.21C.440, enacted in 1995, allows expedited development in specially-planned subareas to meet city goals for infill or redevelopment. See *Davidson Serles & Assoc. v. City of Kirkland,* 159 Wn. App. 616, 631, 246 P.3d 822 (2011) (city center redevelopment);[22] *Kent CARES v. City of Kent,* GMHB Case No. 02-3-

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[20] Pursuant to WAC 242-03-640, the Board in its Agenda for Hearing (April 25, 2016) notified the parties of its intention to consider the Eckert article. "The parties are advised that the presiding officer has found only one authority referencing RCW 43.21C.420, the SEPA provision at issue here. Richard Settle's SEPA Handbook references a newsletter article, "Using SEPA to Encourage Economic Development and Sustainable Communities," by Jeremy Eckert, *Environmental and Land Use Law Newsletter*, June 2011. At the hearing on the merits, you may comment on the article and whether reference by the Board is allowable or appropriate." Neither party at hearing objected to the Board's reference to the Eckert article.

[21] Mr. Eckert credits Richard Settle and Pat Schneider with assisting him in drafting RCW 36.70A.420, as well as in writing the newsletter article. *Id.* at 9, n. 1.

[22] *Davidson Serles,* 159 Wn. App. at 631 (2011): A planned action ordinance enumerates particular "planned actions" that will be allowed to proceed without a threshold determination or an EIS. SEPA authorizes such an approach because the planned action ordinance . . . merely simplifies and expedites the land use permit process by relying on the local government's preexisting land use plan policies and development regulations.

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0015, Order on Motions (November 27, 2002), at 4-5 (station area);[23] *Shoreline Preservation Society, et al., v City of Shoreline,* GMHB No. 15-3-0002, Order on Motions (September 10, 2015), at 4 (station area).[24] Subsequent development within the scope of the planned action is exempt from project-level SEPA review.

The Board notes Mr. Eckert treats these different strategies as available procedural alternatives - a set of "complementary SEPA tools." *Id.* at 9. There is no suggestion that the "transit-infill review" of Section 420 is now mandatory for all transit-centered subarea plans. Rather, "transit-infill review" is an additional option, intended to expedite transit-oriented-development by "addressing the limitations of planned actions and the infill exemption." *Id.* at 8. Far from supplanting other SEPA methodologies, "transit-infill review" in fact contains a sunset provision with a July 18, 2018, cut-off date for completion of any nonproject EIS based on Section 420. *Id*. at 8 (citing RCW 43.21C.420(5)(b)).

The Board reads Mr. Eckert's commentary as further support for interpreting Section 240 as creating an alternative SEPA pathway which a city may elect to adopt, but is not required to use, in developing a particular transit-centered subarea plan.

Finally, "[t]o help clarify the original legislative intent of a statute, we may turn to its subsequent history." *State v. Wofford*, 148 Wn. App. 870, 879, 201 P.3d 389 (2009) (citing *Woods v. Bailet*, 116 Wn. App. 658, 665, 67 P.3d 511 (2003)). The City points out that the legislature in 2016 considered an amendment to RCW 43.21C.420 through HB 2763, which would extend until 2028 the option to limit SEPA appeals as provided in the statute.[25] In the

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[23] *Kent CARES*, GMHB No. 02-3-0015, Order on Motions, at 4-5, citing Wash. Dep't of Ecology, *SEPA Handbook*, §7.4 (1998): [P]lanned action ordinances are more akin to project actions . . . Designating specific types of projects as planned action projects shifts the environmental review of a project from the time a permit application is made to an earlier phase in the planning process. The intent is to provide a more streamlined environmental review process at the project stage by conducting more detailed environmental analysis during planning.

[24] *Shoreline Preservation Society,* GMHB No. 15-3-0002, Order on Motions, at 4: "Planned action" is a SEPA mechanism provided by RCW 43.21C.440 and its implementing regulations, WAC 197-11-164, -168. The planned action is a procedural device allowing streamlined environmental review of a project or projects within the parameters of a previous environmental impact statement (EIS).

[25] Respondent City of Seattle's Prehearing Brief (April 11, 2016) at 8, 9.

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"background" section, the bill analysis describes the 2010 legislation as giving cities the option to adopt a subarea plan that could exempt future projects from SEPA appeals:

> In 2010 the Legislature established a process that allows a city to adopt an optional element of their GMA comprehensive plan and associated development regulations that allow projects consistent with the optional element to be exempt from appeal under the SEPA. . . . *In order to adopt an optional subarea element that exempts qualifying projects from SEPA appeals*, the city must complete an upfront environmental review and public participation processes during the adoption of the optional element.

The summary of the proposed bill then states "[t]he expiring authority that allows a city *to adopt an optional subarea element that limits SEPA appeals of qualifying projects* is extended until 2028." (Emphasis added).

Therefore, the City asserts, in 2016 the legislature again framed the statute as giving cities the option to adopt a subarea element "that exempts qualifying projects from SEPA appeals," directly linking the optional process to the intended consequence of limiting SEPA appeals. To otherwise hold that the environmental review process established in Section 420(4) is mandatory once the choice to adopt a subarea plan is made would divorce the SEPA appeal exemption from all references to it being optional in the legislative history.

In sum, the SEPA Section 420 bill reports, commentary and subsequent legislative history indicate the legislation was intended to provide an alternative up-front SEPA methodology for transit-centered and other city center infill.

The Board concludes enactment of Section 420 created a "voluntary tool" and did not preclude the City from reviewing the U District subarea plan amendments under general SEPA provisions which spell out threshold determination, WAC 197-11-310, public participation (scoping – WAC 197-11-408- and comment – WAC 197-11-500-570), and nonproject environmental review, WAC 197-11-442. The City had the option to use the procedures provided by Section 420 and to preclude subsequent project-level review and

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appeal but chose not to take that route.[26] Because the City did not undertake a Section 420 process for its U District subarea review, it was not required to produce the displacement study referenced in Section 420(4)(f).[27]

Conclusion

The Board finds RCW 43.21C.420 provides an alternative SEPA methodology for environmental review of plans for transit stations areas and city centers which the City had the option to adopt. The Board finds the City did not adopt the Section 420 methodology for its review and adoption of the U District station area plan amendments challenged here. The Board finds and concludes the City was not required to produce the displacement study called for in Section 420(4)(f). The Board concludes the Coalition has failed to meet its burden of demonstrating the City's adoption of Ordinance 124888 violated SEPA.

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board finds:

- Petitioners have failed to meet their burden of demonstrating the City's adoption of Ordinance 124888 violated SEPA.

The Boards ORDERS:

- The matter of *Seattle Displacement Coalition v City of Seattle,* Case No. 15-3-0015*,* is **dismissed** and the case is **closed**.

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[26] The Board notes the City in 2011 adopted SEPA regulations specifying that it did not intend to use the Section 420 methodology for its subarea planning to preclude project-level SEPA appeals. SMC 25.05.680; 23.76.067

[27] The City asserts that the housing affordability analysis contained in its EIS and upheld by the hearing examiner sufficiently addressed risks and mitigation for displacement of existing residents in the subarea. City Brief at 11-12, citing Ex. 49, at 3.2-9 to 3.2-14; Ex. 155, at ¶¶ 24-33.

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ENTERED this 31st day of May, 2016.

Margaret Pageler, Board Member

Cheryl Pflug, Board Member

Raymond L. Paolella, Board Member
(Concurring)

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[28]

[28] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the Board shall be served on the Board but it is not necessary to name the Board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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Concurring Opinion of Board Member Raymond Paolella

I concur with my colleagues in the outcome of this case. However, my analysis of the statute differs from the majority opinion above.

The sole issue in this case is whether Seattle's adoption of Ordinance 124888, amending certain policies and goals in the University Community Urban Center Plan, violates the procedural requirements of RCW 43.21C.420(4)(f), which under certain circumstances requires preparation of an environmental impact statement and separate study that "analyzes the extent to which the proposed subarea plan may result in the displacement or fragmentation of existing businesses, existing residents, including people living with poverty, families with children, and intergenerational households, or cultural groups within the proposed subarea plan." When an optional element is adopted that meets the threshold criteria of RCW 43.21C.420, the Legislature prescribed more extensive environmental review and enhanced notice/community involvement procedures.

Before deciding the ultimate question of whether Ordinance 124888 complies with the "Displacement Study" provision in RCW 43.21C.420(4)(f), the Board must first consider the threshold question of whether the subarea plan amendments in Ordinance 124888 triggered RCW 43.21C.420 in the first place, i.e., did the City "elect to adopt" an "optional comprehensive plan element" that applies within one-half mile of a major transit stop.

The GMA prescribes a formal structure for comprehensive plans that includes plan components called "Elements." Every comprehensive plan must include these required Elements: Land Use, Housing, Capital Facilities, Utilities, Rural Development, Transportation, Economic Development, and Parks and Recreation.[29] In addition, the GMA authorizes "optional elements" that apply within specified subareas of cities for mixed-use/urban centers or major transit stops.[30]

Seattle's 10-year Update to Comprehensive Plan was adopted on December 13, 2004, and the City's update included adoption of the "Neighborhood Planning Element" as

[29] RCW 36.70A.070.
[30] RCW 43.21C.420(1)

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an optional element. Within this Neighborhood Planning Element, the City in 2004 adopted 33 subarea plans, including the University Community Urban Center Plan. These subarea plans are not distinct "optional elements" but rather are embedded subparts of the Neighborhood Planning Element.

Ordinance 124888 amended certain policies and goals in the University Community Urban Center Plan and amended the future land use map for that subarea plan. However, Ordinance 124888 did not amend the other 32 subarea plans and did not replace or re-adopt the Neighborhood Planning Element originally adopted in 2004. The EIS accompanying Ordinance 124888 states a desired objective to amend "development and design standards that permit greater height and density in the U District study area."[31] There is no indication in the EIS that it was prepared to support adoption of an optional comprehensive plan element.

A careful review of Ordinance 124888 shows that the City of Seattle did not "elect to adopt" an "optional comprehensive plan element" that applies within one-half mile of a major transit stop. Ordinance 124888 merely amends one subarea plan within the much larger Neighborhood Planning Element. Ordinance 124888 did not adopt the University Community subarea plan as a distinct comprehensive plan "element." But in any case, the optional element "adoption" took place in 2004, is beyond the appeal period, and cannot be challenged 11 years later in the current case. I also note that RCW 43.21C.420 was enacted in 2010, six years after Seattle's adoption of the optional Neighborhood Planning Element.

This conclusion is buttressed by the enactment of Seattle Municipal Code § 23.76.067 entitled "Amendments to Title 23 to implement RCW 43.21C.420 (SEPA)" which states in subsection A: "Unless an ordinance enacting amendments to Title 23 expressly recites that the ordinance is intended to implement RCW 43.21C.420, the provisions of that statute do not apply to the ordinance." Seattle has thus interpreted RCW 43.21C.420's environmental review process and subsequent preclusion of project-level SEPA appeals as

[31] U District Urban Design Final EIS, p. 2-2 (January 8, 2015).

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being applicable only if the City expressly elected to adopt the particular subarea plan as an optional plan element. Evidence in the record indicates that the Seattle City Council intended: (1) not to act "in accordance with" RCW 43.21C.420 and (2) not to use the streamlined environmental review procedures of subsection .420(4) to preclude project-level SEPA appeals because Seattle citizens would, in City Council's judgment, benefit by preserving such project level appeals.

Petitioners assert that every change, revision, or tweak to a previously adopted subarea plan for major transit stops, no matter how big or small, triggers the requirement for a non-project EIS and also a separate Displacement Study if the amendment pertains to the City of Seattle. I disagree and interpret the enhanced procedural requirements of RCW 43.21C.420 as being triggered only when: (1) a city initially elects to adopt a subarea plan as an optional element within the comprehensive plan, (2) the optional element applies to specified subareas of cities for mixed-use/urban centers or major transit stops zoned to have an average minimum density of fifteen dwelling units or more per gross acre, and (3) the city intends to use the streamlined environmental review procedures of subsection .420(4) to preclude project-level SEPA appeals.

I conclude that Ordinance 124888 did not trigger the enhanced procedural requirements of RCW 43.21C.420 and thus Ordinance 124888 complies with the Growth Management Act.

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